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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of RICHARD HOWARD RHODES,
Deceased.

SHERRA EWING, as Administrator, etc.,

Plaintiff and Respondent,

v.

ALLISON F. HARGROVE, as Trustee,
etc.,

Defendant and Appellant.

G041595

(Super. Ct. No. A238866)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Marjorie Laird Carter, Judge. Appeal dismissed.

Theodore C. Beall for Defendant and Appellant.

Law Office of Paul D. Stucki and Paul D. Stucki for Plaintiff and Respondent.

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Plaintiff Sherra Ewing is the beneficiary of the estate of Richard Howard Rhodes. Rhodes, in turn, was a beneficiary of the Rhodes Family Trust, which was created by his parents. An amendment to the trust provided that, if “before full distribution of the trust estate, any of the beneficiaries . . . are deceased . . ., the trust shall then be distributed one-half . . . to those persons who would then be Husband’s heirs and one-half . . . to those persons who would then be Wife’s heirs”

When Rhodes died, he was still due \$55,564.37 in distributions from the trust. The issue tried in the probate court was whether these distributions were unreasonably withheld prior to the death of Rhodes. Defendant Allison F. Hargrove, trustee of the Rhodes Family Trust and a claimant to one-half of the retained distributions, alleged that the siblings had entered into an oral agreement, before the death of Rhodes, to delay these distributions. Because the trial court disbelieved this testimony and because defendant’s conduct in several respects was inconsistent with this contention, it held that the benefits were wrongfully withheld and ruled in favor of plaintiff. The court also concluded defendant had acted in bad faith in withholding the distributions and doubled the award to plaintiff under Probate Code section 859. (All further statutory references are to this code.)

The court issued a signed document entitled “notice of ruling” (bold and capitalization omitted) on November 5, 2008. The so-called notice of ruling contains the court’s summary of the claims and the evidence and concludes: “It is ordered that . . . Allison Hargrove, Trustee, pay to . . . Sherra Ewing, Administrator of the Estate of Richard Howard Rhodes, the undistributed balance due to decedent in the amount of \$55,564.37 plus interest. [¶] The Court finds [Allison Hargrove] acted in bad faith and pursuant to Probate Code [section] 859, doubles the amount awarded [Sherra Ewing, Administrator].” The clerk served a copy of the notice of ruling on defendant on November 6, 2008. Defendant filed her notice of appeal on February 4, 2009, indicating that the appeal was from the November 5, 2008 order.

On February 23, 2009, the trial court issued a “judgment” (capitalization omitted) containing the same disposition as the earlier so-called notice of ruling, except that the amount of interest accrued to the date of the judgment is included and the judgment notes the total amount due as of that date is \$153,174.98 (\$55,564.37 doubled, plus interest).

Plaintiff contends the appeal is untimely and we agree.

Where the clerk serves a party with a “judgment,” an appellant must file the notice of appeal within 60 days. (Cal. Rules of Court, rule 8.104(a)(1).) What is the “judgment” here? If the so-called notice of ruling constitutes the “judgment,” the notice of appeal had to be filed 60 days thereafter, not the 90 days when defendant filed her notice. The subsequently filed “judgment” would not revive defendant’s right to appeal, except with respect to prejudgment interest, not an issue here. We must therefore determine whether the so-called notice of ruling is an appealable order.

Plaintiff filed her petition under section 850, subdivision (a)(2). Section 1300 specifies those probate orders from which an appeal may be taken. This includes an order “[a]djudicating the merits of a claim made under Part 19 (commencing with Section 850)” (§ 1300, subd. (k).) The court’s so-called notice of ruling is, in effect, an order adjudicating the merits of a claim made under section 850 and was thus an appealable order under section 1300, subdivision (k). The absence of the word “judgment” is not fatal because the term “‘judgment’ includes an appealable order if the appeal is from an appealable order.” (Cal. Rules of Court, rule 8.104(f).) The subsequently issued “judgment” does not affect this result. Thus the notice of appeal was untimely.

DISPOSITION

The appeal is dismissed. In the interest of justice, the parties shall bear their own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

O'LEARY, J.